United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1214

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To Be Argued by
BERNARD J. FRIED

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-1214

B/S

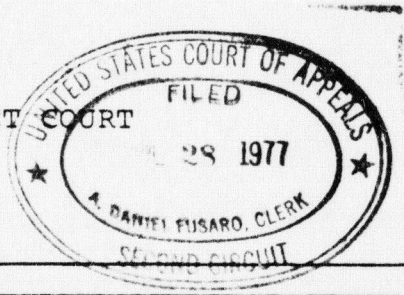
UNITED STATES OF AMERICA,

Appellee,

-v-

Kenneth Charles Davis,

Appellant,



ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York

BERNARD J. FRIED,
Assistant United States Attorney,
(Of Counsel)

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PRELIMINARY STATEMENT

Kenneth Charles Davis appeals from an order of the United States District Court for the Eastern District of New York (Platt. J.) entered in April 7, 1977, denying his presentence motion to withdraw a guilty plea to a violation of the Selective Service Act. Appellant had been charged in a two count indictment filed in the United States District Court for New Jersey. Pursuant to Rule 20, Fed. R. Crim. P., this indictment was transferred to the Eastern District where appellant, pleaded guilty, on December 14, 1976, to Count One which charged a failure to report for induction into the Armed Forces in violation of 50 U.S.C. Appendix §462. Appellant, who has not yet been sentenced on this case due to the effect of Presidential Proclamation of Pardon on January 21, 1977 (Proclamation 4483), also seeks a writ of mandamus directing Judge Platt to vacate the plea of guilty and to return the case to the District of New Jersey. Appellant is not in custody.

Appellant argues that the district court erred in its refusal to permit presentence withdrawal of the guilty plea and that, under the circumstances of this case, where finality can never be achieved due to the pardon, the indictment must be dismissed.

Our position on this appeal is that this Court should take whatever action it deems appropriate. Moreover, on the merits, it is our view, as it was below, that it would not have been inappropriate, under the circumstances, for the district court to have permitted presentence withdrawal of the plea and the return of the case to the District of New Jersey.

STATEMENT OF THE CASE

On June 1, 1973, a Grand Jury sitting in the District of New Jersey filed a two count indictment charging appellant with failing to report for induction (Count One) and with failing to keep his local board informed of his current address (Count Two), both charges in violation of 50 U.S.C. Appendix §462.

Thereafter, on December 1, 1976, the case was transferred to the Eastern District of New York pursuant to Rule 20, Fed. R. Crim. P. On December 17, 1976, appellant entered a plea of guilty to Count One, acknowledging that he had failed to report for induction as charged. The case was then adjourned without date for sentencing.

On January 21, 1977 the Presidential Proclamation of Pardon was issued and became effective. By its terms, with certain exceptions not here relevant, the President granted "a full and unconditional pardon" to Selective Service Act violators (from August 4, 1964 to March 28, 1973). In an accompanying Executive Order, No. 11967, "[t]he Attorney General [was directed to] cause to be dismissed with prejudice to the government all pending indictments for violations of the Military Selective Service Act" during the specified period, with the exceptions mentioned. (emphasis added). 1/

1/ We could not move to dismiss the indictment in the Eastern District of New York because after a case has been transferred pursuant to Rule 20, Fed. R. Crim. P., the transferee court has jurisdiction only for the purpose of accepting a plea of guilty or nolo contendre. Rule 20(c), Fed. R. Crim. P.

Following this pardon, and prior to imposition of sentence, appellant moved to withdraw his plea of guilty and for return of the case to the District of New Jersey. At argument, on February 8, 1977, the United States did not object to the motion and indicated that, in light of the instructions concerning pending indictments, "a fair argument can be made, [that] a conviction under these circumstances would be unjust" (Tr., 2/8/77, p. 9). Following further argument and the submission of papers by the appellant, the motion was denied by Judge Platt in an opinion and order entered on April 7, 1977. 2/

2/ In his opinion, Judge Platt decided that the pardon did not render all proceedings under the pending indictment moot; that if the defendant's motion to withdraw the plea were granted it would constitute a waiver of the pardon inasmuch as there would be a denial of guilt; and that the defendant could interpose the pardon as a bar to future proceedings, including sentencing, in this case. We believe that the pardon did, in fact, moot the proceedings in this case precisely because, there is no adverse legal consequence which flows from the unwithdrawn guilty plea. Bjerkan v. United States, 529 F.2d 125 (7th Cir. 1975). However, we disagree that the granting of the motion for withdrawal constituted or would constitute a rejection of the pardon. This assumption, it seems to us, overlooks the procedural posture of this case which permitted appellant no other remedy since dismissal was not authorized in the Eastern District of New York. Finally, we agree, of course, that the pardon could be interposed by appellant in bar of further proceedings.

ARGUMENT

THE UNITED STATES DOES NOT OPPOSE VACATING THE ORDER BELOW, OR IF THIS COURT DEEMS IT APPROPRIATE, THE GRANTING OF A WRIT OF MANDAMUS

It is our position that the net effect of the pardon is to deny United States any further interest in the outcome of these proceedings. If the proceedings below are upheld, there is simply no further action with respect to this appellant that the government is empowered to take. If the case is returned to the District of New Jersey, by direction of the President, the United States will move to dismiss the indictment. Thus, arguably, there is no "case" or "controversy" before this Court in which the United States has an adverse interest.

However, notwithstanding this lack of an adversary interest in the outcome of these proceedings, it is our view, as it was in the district court, that it would not have been inappropriate as a "fair and just" exercise of discretion, United States v. Michaelson, 522 F.2d 472, 475 (2d Cir. 1977), for the court to have permitted, under all the circumstances, the presentence withdrawal of the guilty plea.

CONCLUSION

This Court should take whatever action with respect to the appeal that it deems appropriate.

Dated: Brooklyn, New York
July 27, 1977

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

Bernard J. Fried,
Assistant U.S. Attorney
(Of Counsel).

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

DOLORES M. BYRD being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 27th day of July 19 77 he served a copy of the within

BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

WILLIAM J. GALLAGHER, ESQ. LEGAL AID SOCIETY, 509 U. S. COURTHOUSE,
FOLEY SQUARE, NEW YORK, NEW YORK 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Dolores M Byrd

Sworn to before me this
27th day of July 19 77

Barbara A Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979